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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1942.

No. 1023

BENJAMIN MALTZ, INDIVIDUALLY, DOING BUSINESS AS EXCEL MANUFACTURING COMPANY,

Petitioner,

vs.

GEORGE D. SAX, ET AL.,

Respondents.

BRIEF AND ARGUMENT OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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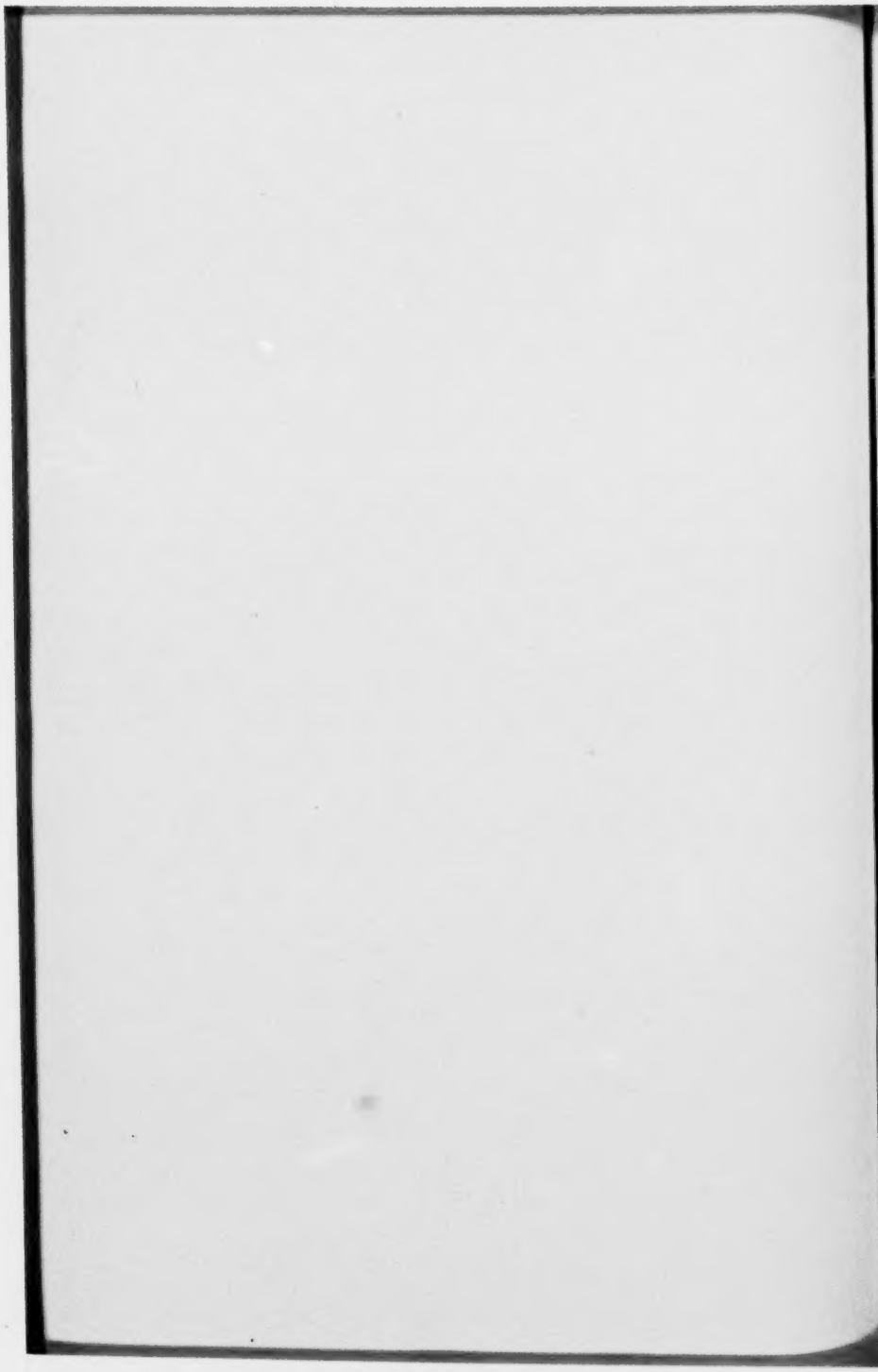

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BRIEF AND ARGUMENT OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

The Circuit Court of Appeals Did Not Assume or Declare a Public Policy Against the Sale and Distribution of Gambling Devices, but Followed That Policy Already Established.

We rely chiefly on *Federal Trade Commission* v. *Keppel & Bro.*, 291 U. S. 304, on writ of certiorari to the Circuit Court of Appeals, 3rd Circuit, to review a decree setting aside an order of the Federal Trade Commission forbidding certain trade practices as an unfair method of competition. The Commission found that respondent manufactured, sold, and distributed in interstate commerce package as-

sortments of candies known as "break and take" packages in competition with manufacturers selling and distributing so-called "straight goods" packages; that the use of the "break and take" package in the retail trade involved the sale and distribution of candy by lot or chance; that it was a lottery or gambling device which encouraged gambling among children, and that the sale or distribution of candy by lot or chance is against public policy. This Court found that the effects of the devices were felt throughout the penny candy industry and said (p. 309):

> "A practice so widespread and so far-reaching in its consequences is of public concern if in other respects within the purview of the statute."

Further on, the opinion says of this practice (p. 313):

> "Such devices have met with condemnation throughout the community. Without inquiry whether, as respondent contends, the criminal statutes imposing penalties on gambling, lotteries and the like, fail to reach this particular practice in most or all of the states, it is clear that the practice is of the sort which the common law and criminal statutes have long deemed contrary to public policy."

The *Keppel* case involved the Federal Trade Commission Act, not the Sherman Act, but as we understand it, the Commission came into being as an aid to the enforcement of the general governmental anti-trust and anti-monopoly policy, and that its lawful jurisdiction does not go beyond the limits of fair relationship to that policy. *Raladam Co.* v. *Federal Trade Commission,* 42 F. (2d) 430, 435.

The question in the *Keppel* case was whether or not the practice complained of was unfair. The court concluded that the practice was unfair because it employed devices, namely gambling devices, that long had been deemed contrary to public policy. The device under scrutiny in the *Keppel* case was similar in character to the device involved in this case, which is variously termed a "sales card" or "punch board." The *Keppel* case is important in that at

the time of its decision some forty pending cases were awaiting the decision, and it has been cited and followed in numerous Circuit Court of Appeals cases since the decision. It is not to be supposed that there exists a public policy against gambling and gambling devices which renders practices unfair under the Federal Trade Commission Act, but that such a policy does not exist for determining whether it is in the public interest to strike down restraints on commerce in gambling devices.

In *Hofeller* v. *Federal Trade Commission,* 82 F. (2d) 647 (7th Cir. 1936) the court said (p. 649):

> "It is quite impossible to escape the conclusion that where a competitive method employs a device whereby the amount of the return is made to depend upon chance, such method is condemned as being contrary to public policy."

In *Federal Trade Commission* v. *F. A. Martoccio Co.,* 87 F. (d) 561 (8th Cir. 1937) involving the sale of candy by a "push card," the court said (p. 564):

> "But the Keppel case seems to declare, or at least necessarily infer, that there is an injury to the consuming public through violation of the public policy opposing games of chance. * * * There is the public view and public policy against gambling and games of chance and that public policy is given full force in the Keppel Case."

In *Bunte Bros.* v. *Federal Trade Commission,* 104 F. (2d) 996 (7th Cir. 1939) it was stated that a gambling apparatus is contrary to public policy *per se* and that the use of it constitutes an unfair trade practice. To the same effect are *National Candy Co.* v. *Federal Trade Commission,* 104 F. (2d) 999 (7th Cir. 1939), *Ostler Candy Co.* v. *Federal Trade Commission,* 106 F. (2d) 962 (10th Cir. 1939), *Chicago Silk Co.* v. *Federal Trade Commission,* 90 F. (2d) 689 (7th Cir. 1937), and *Ardelle Inc.* v. *F. T. C.,* 101 F. (2d) 718, and numerous other cases.

II.

The Sherman Act Was Enacted for the Protection of the Public Welfare and to Protect Legal Rights.

The Sherman Act was enacted principally for the protection of the public welfare. In *Ramsay Co.* v. *Associated Bill Posters,* 260 U. S. 501, 512, it was said the fundamental purpose of the Act was to secure equality of opportunity and "to protect the public against evils commonly incident to destruction of competition through monopolies and its combinations in restraint of trade."

In *D. R. Wylder Mfg. Co.* v. *Corn Products Ref. Co.,* 236 U. S. 165, 174, it was said that founded upon broad conceptions of public policy the prohibitions of the Sherman Act would prevent not the mere injury to an individual "but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, * * *."

In *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 43, the court said the Sherman Act seeks to protect the public against evils commonly incident to the unreasonable destruction of competition. Where the use of a gambling device constitutes an unfair practice within the meaning of the Federal Trade Commission Act, it could not be regarded as in the public interest to restore or increase competition in the manufacture and sale of such devices.

As stated in the opinion below, it was said by Mr. Justice Brandeis in *Keogh* v. *Chicago & North Western Ry. Co.,* 260 U. S. 156, 163, speaking of the right of action to one who has been injured in his business or property: "Injury implies violation of a legal right." The court below correctly concluded that one has no legal right to conduct a business in violation of the public policy of the

country and that no injury can be sustained in respect of conducting that business.

III.

The Circuit Court of Appeals Did Not Erroneously Apply the Doctrine of Unclean Hands, Nor Err in Regarding Petitioner in Particeps Criminins with the Purchasers of His Gambling Devices.

It is contended by petitioner that the Circuit Court of Appeals has applied the doctrine of unclean hands in violation of *Keystone Co.* v. *Excavator Co.*, 290 U. S. 240. We contend this case comes within the rule announced in the *Keystone* case. There is a clear relationship between the unclean hands and the relief sought. The claimed treble damages are based on actual damages sustained. If there are any actual damages, they are to a business carried on in violation of a public policy of the United States, which violation the Court would stamp with approval in allowing damages. Furthermore, the allowance of treble damages is one means of enforcing the Sherman Act. This kind of enforcement would result only in stimulating a violation of the public policy of the country and the increase in gambling throughout the United States. The Circuit Court of Appeals was correct in saying that *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 490, 492, announces an exception to the rule as to unclean hands stated in the *Keystone* case. There it was said it is a principle of general application that courts may appropriately withhold their aid where the plaintiff is using the right asserted contrary to the public interest. That clearly is true of plaintiff in this case, if there is a public policy against gambling in this country.

The Court below (R. 36) said that rather than deny plaintiff relief because he came into court with unclean

hands, it would be as well or better to state that he seeks damages for a business that makes him a criminal partner to gamblers and that his part is to aid a gambling business. Petitioner objects there is no basis for this statement because there is no Federal law against gambling (except certain lottery provisions). The argument of *in particeps criminis* is not shorn of its potency merely because that which is a crime in nearly every state of the Union has not been enacted into law by the Congress. The Court below was correct in concluding that plaintiff was "not entitled to judicial assistance" without regard to whether his criminal partnership arose from the violation of a state law or a federal law.

IV.

As the Circuit Court of Appeals Found, Petitioner Is Not Entitled to Aid of the Court.

Whether or not it is correct to say that petitioner by his suit has not complied with the maxim as to coming into court with unclean hands, it is clear that the legal maxim "*Ex dolo malo non oritur actio*" does apply and that petitioner under the facts of this case is not entitled to the aid of the court either in the enforcement of a claimed right under the Sherman Act or any other provision of law. This maxim has been applied by this court in many cases. *Harris* v. *Runnels,* 12 How. 79, 13 L. Ed. 901; *Bank of the United States* v. *Owens,* 2 Pet. 527, 536, 7 L. Ed. 508; *Ewell* v. *Daggs,* 108 U. S. 143, 149, 27 L. Ed. 682, 684. See also *Stewart* v. *Wright,* 147 Fed. 321.

In *Ewell* v. *Daggs,* 108 U. S. 143, 149, the court said:

> "And *Lord* Mansfield, in *Holman* v. *Johnson,* Cowp. 341, stated the ground on which, in such cases, courts proceed. He said: 'The principle of public policy is this: *Ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cause of action

upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appear to arise *ex turpi causa,* or the transgression of a positive law of this country, then the court says he has no right to be assisted. It is upon that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

In *Bank of the United States* v. *Owens,* 2 Pet. 527, 536, the court said the answer to the question whether the contracts involved were void in law

> "would seem to be plain and obvious, that no court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of a country; how can they then become auxiliary to the consummation of violations of laws?"

In *Stewart* v. *Wright,* 147 Fed. 321, Circuit Judge Sanborn, dissenting at page 338, announces the rule as to *ex dolo malo non oritur actio,* and on pages 343, 346 reviews a number of United States Supreme Court decisions in regard to this maxim and says:

> "If the decisions of the Supreme Court have not been misapprehended, they evidence a uniform and established public policy of the nation to refuse to maintain in its courts any action which is founded in a plaintiff's immoral contract or act, or in his contract or act violative of a general law of public policy."

V.

The Petition Does Not Present Any Special or Important Reason for Allowance of the Writ of Certiorari As Contemplated by Rule 38-5 (b).

It does not appear that the decision is in conflict with the decision of another Circuit Court of Appeals on the same matter. The decision below has not decided an important question of local law. Petitioner has not shown that the Circuit Court of Appeals decided an important question

of federal law which has not been but should be settled by this Court; or has decided a federal question in a way probably in conflict with applicable decisions of this Court.

We respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Of Counsel.

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